Supreme Court, U.S.
FILED
DEC 11 1995
CLERK

(2)

No. 95-740

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE COMPANY,
Petitioner,

v.

EVELYN CROCKER
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LARRY W. MORRIS
CLAY HORNSBY
MORRIS, HAYNES, INGRAM
& HORNSBY
P.O. Box 1660
Alexander City, AL 35010
(205) 329-2000

JONATHAN S. MASSEY
Counsel of Record
3920 Northampton St., N.W.
Washington, D.C. 20015
(202) 686-0457

Counsel for Respondent

December 11, 1995

27 pp

TABLE OF CONTENTS

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE WRIT 8

I. PETITIONER ERRONEOUSLY ASSUMES THAT THE ENTIRE $2 MILLION AWARD IS PUNITIVE 8

II. IN ANY EVENT, THE AWARD IN THIS CASE WOULD NOT BE EXCESSIVE, EVEN IF ALL $2 MILLION WERE PUNITIVE 12

III. THIS CASE IS UNRELATED TO *BMW v. GORE* 20

CONCLUSION 23

TABLE OF AUTHORITIES

Cases: **Page**

AJ & AJ Servicing Inc. v. Tudor Associates Ltd., 115 S. Ct. 1957 (1995) 23
Alabama Power Co. v. Harmon, 483 So.2d 386 (Ala. 1986) 12
Birmingham Electric Co. v. Thompson, 37 So.2d 633 (Ala. 1948) 12
BMW of North America, Inc. v. Gore, No. 94-896 . . . . . 1, 3, 21, 22
Boyajian v. Olfacto-Labs, 115 S. Ct. 2247 (1995) 23
Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 14, 18
Day v. Woodworth, 62 U.S. (21 How.) 202 (1858) . . . 19
Duck Head Apparel Co. v. Hoots, 659 So.2d 897 (Ala. 1995) 12
Ezzone v. Hansen, 115 S. Ct. 1958 (1995) 23
Ferrellgas Inc. v. Clay, 115 S. Ct. 1102 (1995) 23
Gust v. Levy, 116 S. Ct. 171 (1995) 23
Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994) . . . 3
Life Insurance Co. of Georgia v. Johnson, No. 1940357 (Ala. Nov. 17, 1995) 3, 11, 13, 18, 19, 22
Missouri Pacific Railway Co. v. Humes, 115 U.S. 512 (1885) 20
Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 18-19
O'Quinn v. Kline, 115 S. Ct. 2579 (1995) 23
Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 3, 4, 12, 13, 14, 18, 19
St. Louis, I. Mt. & So. Ry. Co. v. Williams, 251 U.S. 63 (1919) 14
Smithtown, N.Y. v. Walz, 115 S. Ct. 2557 (1995) 23

TABLE OF AUTHORITIES — Continued

Cases: **Page**

Sperau v. Ford Motor Co., 1995 Ala. Lexis 263 (Ala. June 9, 1995), petition for cert. filed (Nov. 15, 1995) 11
TXO Prod. Corp. v. Alliance Resources, Inc., 113 S. Ct. 2711 (1993) 3, 13, 14, 18
Washington Gas Co. v. Lansden, 172 U.S. 534 (1899) . 19

Miscellaneous:

Note, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 Pac. L.J. 823 (1978) 20
Punitive Damages: Relationship to Defendant's Wealth, 87 A.L.R.4th 141 (1992) 19
Restatement (Second) of Torts (1977) 19

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE COMPANY,

Petitioner,

v.

EVELYN CROCKER

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition challenges a $2 million damages award for intentional insurance fraud, which was reduced by the Alabama courts from the jury's original verdict of $5 million. The petition focuses its request for review almost entirely on the claim that it raises "a virtually identical issue" to that presented in *BMW of North America, Inc. v. Gore*, No. 94-896. That claim is inaccurate.

This case presents none of the questions of extraterritorial punishment, the role of remittiturs in curing constitutional error, and the possibility of multiple punishments for a single course of conduct, that are present in *BMW v. Gore*. The sole question presented here is an excessiveness claim. Indeed, although petitioner stated in its application for stay of the enforcement of the judgment below (which this Court granted by Order of October 10, 1995, 116 S. Ct. 295), that it would present *three* questions for this Court's review — including an extraterritoriality question and a procedural due process

question[1] — the sole question presented in the petition for certiorari concerns excessiveness.[2]

Petitioner's excessiveness claim is merely an argument that the Alabama courts misapplied settled principles of law. Such a claim is precisely the sort of factbound issue that does not warrant this Court's review. The Alabama courts have given full and fair consideration to any claim that petitioner wished to raise. Indeed, petitioner has had no fewer than *five* separate opportunities to challenge the judgment before the Alabama

---

[1] In the Application for Stay, petitioner stated that, "[s]pecifically, the issues to be presented are:

> 1. whether the $3 million punitive damage award in this case — $2 million of which the respondent, Evelyn Crocker is seeking from Union Security, which is 137 times Crocker's economic damages, and serves as punishment for *one isolated incident* by a Union Security agent — is so excessive as to violate the Due Process Clause and
>
> 2. whether the $3 million punitive damage award is unconstitutional given that the jury's award was based upon *alleged and unproven* fraudulent acts occurring outside the State of Alabama, which constitutes extraterritorial punishment that violates the Constitution.
>
> 3. A third issue, unique to the present case, is whether Union Security's due process rights were violated by the trial court's refusal to conduct a *Hammond* hearing, or consider evidence submitted by Union Security, after remand by the Alabama Supreme Court to conduct such a hearing."

Application for Stay at 2-3.

[2] The sole question presented by the petition is:

> Whether the $2 million punitive exaction in this case, which is at least 137 times the economic harm suffered by respondent, is so grossly excessive as to violate the Due Process Clause of the Fourteenth Amendment.

Pet. i.

courts: (1) an initial remittitur hearing before the Circuit Court for Choctaw County, Alabama, in which the court reduced the punitive award by 40%; (2) a subsequent proceeding before the trial court, after a co-defendant settled with the respondent; (3) a full appeal on the merits before the Alabama Supreme Court; (4) a rehearing petition; and (5) a denied application for stay.

This is a case where the processes of judicial review have *worked*. The original $5 million award has been reduced to $2 million. The Alabama courts have provided an ample explanation of why the remaining award is reasonable and have faithfully applied the principles of *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), *TXO Prod. Corp. v. Alliance Resources, Inc.*, 113 S. Ct. 2711 (1993), and *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994). There is no need for this Court's review, and nothing that this Court might hold in *BMW v. Gore* will have any bearing on this case.

Moreover, special features of this case make this Court's review particularly inappropriate. Although petitioner assumes that the entire $2 million award is punitive in nature, in fact the award contains a substantial compensatory component representing mental anguish suffered by respondent. At trial, petitioner declined to request an itemized verdict separating punitive and compensatory damages. As a result, petitioner's attempt to compute the precise relationship between the harm suffered by respondent and the punitive damage award is sheer conjecture.

In addition, the Alabama Supreme Court has recently announced a substantial modification of the State's system for awarding punitive damages. *Life Insurance Co. of Georgia v. Johnson*, No. 1940357 (Ala. Nov. 17, 1995). Henceforth, actions seeking punitive damages will be bifurcated into separate compensatory and punitive damages phases; jury instructions will be made even more detailed than those approved by this Court in *Haslip*; full post-trial judicial review

will be retained; and 50% of any final punitive judgment will be paid to the State rather than the plaintiff. These new procedures fully implement — indeed, they plainly exceed — the requirements of the federal Constitution. Petitioner asks this Court to review an Alabama punitive damages system that no longer exists.

The petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

Petitioner's statement of the case is in effect an extensive jury argument that fails to present the facts in the light most favorable to the judgment below and indeed quarrels with the findings of the Alabama Supreme Court on several important issues of fact. Pet. 5-7 nn. 6-9, 14 n.11. There could be no better indication of the fact-specific, uncertworthy nature of this case than petitioner's need to re-argue facts found by the Alabama Supreme Court.

This case involves an intentional fraud by petitioner's agent, for which petitioner is liable under the Alabama law of respondeat superior approved by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In addition to its vicarious liability, petitioner itself committed culpable acts that warranted punitive damages.[3] Petitioner had adopted a deliberate "see-no-evil" policy that facilitated the commission of fraudulent acts by its agents. Furthermore, it failed to provide its insureds with written copies of their policies, as

---

[3] The jury was properly instructed that, under Alabama law, it could *not* impose punitive damages on petitioner unless (1) it "knew or should have known of the awareness of the agent . . . [and] continued to employ him or used his services without proper instruction with a disregard of the rights or safety of others"; or (2) it authorized or ratified his misconduct; or (3) "the acts of the agent were calculated to or did benefit the principal." R. 915-16.

required by Alabama law. Such a failure made it impossible for the insureds to protect themselves against the agent's fraud.

1. *Union Security's Business.* Petitioner Union Security sells credit life insurance in conjunction with loans made by First Alabama Bank in Choctaw County, Alabama. Under this arrangement, Union Security, in exchange for a premium, pays off any outstanding loan balance in the event of the borrower's death. Petitioner authorized Sammy Taylor, a First Alabama branch manager in Choctaw County, as its agent to offer the coverage to loan applicants. Pet. App. 5a; R. 302-03.[4] Contrary to petitioner's claim (Pet. 7 n.9), Taylor testified that he received from Union Security "a monetary payment or incentive connected with the sale of credit life insurance." R. 540. The Alabama Supreme Court found that Union Security paid Taylor a "commission." Pet. App. 3a, 5a.

For credit life policies in excess of $10,000, Union Security required a "Statement of Debtor's Physical Condition." Pet. App. 3a. This health statement authorized Union Security to obtain all information related to the health, medical history, diagnosis, treatment, employment, or financial condition of the applicant, for purposes of evaluating or underwriting the application for credit life coverage. *Id.* The statement contained nine boxes to be checked "yes" or "no" in response to specific questions concerning the applicant's medical history. As a matter of company policy, Union Security issued credit life coverage only if all nine boxes were checked "no." *Id.*

2. *The Crockers.* Coleman and Evelyn Crocker were residents of Choctaw County who had been married some 31 years. They were people of modest means who lived in a

---

[4] References to the Appendix to the Petition for Certiorari are styled "Pet. App. __a." References to the Reporter's Transcript of the trial below are styled "R. __." References to the Record of the clerk of the trial court are styled "Ct. R. __."

mobile home. Coleman had a history of heart problems and Parkinson's disease. He had heart by-pass surgery in 1984 and an angioplasty procedure in 1988. R. 565. He died in August 1991.

Mr. Taylor had known the Crockers for over two decades and was very familiar with Mr. Crocker's health history. As the Alabama Supreme Court found, "during the years that Mr. Crocker suffered from heart disease and Parkinson's disease," Pet. App. 5a, the families had fished together, vacationed together, and dined in each other's homes. R. 492, 532-33.

In October 1990, Evelyn called Taylor about taking out a $24,000 loan with First Alabama Bank. According to Evelyn, Taylor told her (falsely) that "we would be required to have credit life," and she replied that the Crockers would accept credit loan coverage. R. 571-73. The Alabama Supreme Court found that the evidence showed that Taylor's fraud "induced [the Crockers] to obtain the credit life coverage." Pet. App. 6a.[5]

But the evidence showed that Taylor knew that Coleman was uninsurable. A First Alabama employee testified that she specifically recalled a conversation in which Taylor had asked Evelyn Crocker "how Coleman was, did the procedure, his heart procedure that they had time, did it work this time" (R. 637), referring to the angioplasty performed in 1988. She further recalled on other occasions that Taylor had asked Evelyn if Coleman was doing better. R. 638. Another witness

---

[5] Petitioner states that it is "undisputed that the Crockers affirmatively wanted credit life for this loan *without regard to Taylor's alleged representation*." Pet. 5-6 n.6. The record, however, says nothing of the sort. Mrs. Crocker testified merely that, *after* Taylor told her that "we would be required to have credit life," she replied that it was "all right" with her. R. 572. She also testified that Taylor's misrepresentation that "in the event something happened to either of [the Crockers], then the credit life would pay off the loan," was "one of the reasons" that they bought it. R. 629.

testified that Taylor admitted to him that he knew that Coleman had had heart surgery, undergone an angioplasty, and suffered from Parkinson's disease. R. 649-51.

Taylor failed to request the Crockers to fill out the medical statement and failed even to ask them for medical information. Instead, he filled out the medical statement himself, R. 495, and falsified the information he put on the application. As the Alabama Supreme Court found, "doing so enabled him to issue the insurance policy to them and collect the commission from the policy for himself." Pet. App. 6a. Taylor then called the Crockers and told them that the papers relating to the loan — 10 to 12 documents in all — were ready for them to sign. R. 572. Taylor asked absolutely nothing of the Crockers with regard to prior health history. R. 576, 577. "He said [to Evelyn Crocker], 'you are covered with credit life in case something were to happen to you or your husband,' and he said in the event something did, if one of us was to die, then our balance at the bank would be paid off." R. 575. Ironically, Coleman experienced noticeable tremors from Parkinson's disease on the very day that the application forms were signed. Pet. App. 5a.[6]

As the Alabama Supreme Court found, "[t]he evidence shows that at the time he prepared the Crockers' health disclosure statements, Taylor had been acting as the agent for Union Security in the sale of credit life policies for many years and was quite knowledgeable about the qualifications an applicant must have in order to obtain credit life coverage." Pet. App.

---

[6] When asked at trial about whether he had questioned the Crockers regarding the health statement, Taylor replied: "No sir, because if he had answered "YES" on any, I would have discontinued the credit life." R. 509. Taylor stated that, on the other hand, if all boxes were checked "NO," the bank and Union Security would have received — in his words — an "award." R. 556-57.

5a. In addition, "[t]here is no evidence that the Crockers had such knowledge and experience concerning credit life policies that would have put them at arm's length in their dealings with Taylor; on the contrary, the evidence shows that the Crockers relied on Taylor's expertise and superior knowledge and regarded him as their source of information concerning their loan transaction and the process of applying for credit life insurance. In view of this evidence, the jury could reasonably find that Taylor had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death." *Id.* at 6a.

3. *Union Security's refusal to pay.* After Mr. Crocker's death, petitioner refused to pay benefits on the credit life insurance policy, explaining that "[h]ad full disclosure been made at the time the Health Statement was completed coverage would not have been written on this loan." Ct. R. 311. Consequently, Evelyn was unable to make payments to First Alabama on her home mortgage and was threatened with legal action by the bank. R. 582, 584. Union Security took no steps to ensure that a refund of the insurance premium was made. Although First Alabama bank eventually credited the Crockers' loan with a refund representing the premium attributable to Mr. Crocker, no refund was made until after suit was filed. R. 742.

REASONS FOR DENYING THE WRIT

I. PETITIONER ERRONEOUSLY ASSUMES THAT THE ENTIRE $2 MILLION AWARD IS PUNITIVE

Petitioner's excessiveness claim is premised on the faulty

assumption that the entire $2 million damage award is punitive in nature. In fact, however, a substantial portion appears to represent compensation for mental anguish.

At trial, petitioner did not request an itemized verdict. Pet. App. 15a. Accordingly, the jury's verdict encompasses respondent's claim for mental anguish, on which the jury was instructed it could award damages.[7] Thus, the trial court explained that "in the instant case it is . . . difficult for this Court to attribute the amount of the award to punitive damages, for the Court's oral charge to the jury on compensatory damages contained, inter alia, an element of damages for mental anguish." *Id.* at 16a. Indeed, the amount of punitive damages in this case is wholly speculative.

Petitioner claims that "there was no testimony whatever about mental anguish." Pet. 17. Yet the trial court found otherwise. It explained that "[t]he harm that resulted in this case is that the defendant Union Security Life Insurance Company failed to pay the claim of the plaintiff, i.e., the balance of the loan to creditor-defendant First Alabama bank, upon the death of plaintiff's husband, and thus not only was the loan, which was secured by a mortgage on her home, not paid, but all the expectations for which the plaintiff and her deceased husband had bargained and paid for, totally failed. The damages to plaintiff were grievous and, therefore, the damages should be substantial." Pet. App. 20a. Respondent faced "the prospect of losing her home when she thought it would be paid for by her deceased husband's credit life insurance." *Id.* at 17a.

Indeed, the record clearly supported a substantial

---

[7] "[T]he law has no fixed monetary standard to compensate for mental anguish. This element of damage is left to your good sound judgment and discretion as to what amount would reasonably and fairly compensate the plaintiff for such mental anguish as your find from the evidence that the plaintiff did suffer." R. 915.

compensatory award for mental anguish. At the time of the fraud, Mrs. Crocker was a 50-year-old woman who lived in a mobile home with her sixteen-year-old daughter. R. 562, 563. A disabled 25-year-old son lived nearby. R. 563. Mrs. Crocker worked part-time for the U.S. Postal Service. R. 564. Three weeks after her husband's death, Mrs. Crocker received a letter from Union Security — a company she "had never heard of," since it had never provided her with a written insurance policy, R. 580 — stating that "benefits are not payable" and her claim was being "investigated." R. 580. Mr. Taylor told her that "it looked like to him if it was investigated it should have been done when we took the loan out rather than after my husband died." R. 581. Ten days later, she received another letter misspelling her name and stating that Union Security would not pay benefits under the policy. R. 582. Mrs. Crocker told Mr. Taylor that "I need my money." R. 583. He advised her to retain a lawyer. R. 584.

Two months later, during the Christmas holiday season, Mrs. Crocker received a letter from the bank stating that her home mortgage loan payments were past due in the amount of $1,458.00 and threatening to refer the matter to the bank's attorneys unless uniess she paid the past due amount within nine days. R. 517-18, 584. At trial, Mrs. Crocker indicated that she understood the threat as involving foreclosure on her mobile home. R. 584. Mr. Taylor confirmed that he planned to tell the bank's lawyers to "initiate foreclosure proceedings" on Mrs. Crocker's home. R. 518. Of course, Mrs. Crocker had been led to believe by petitioner's agent that the credit life insurance would cover the loan repayment. And the past due amount was $200 *less* (R. 517-18) than the credit life insurance premium which petitioner concedes was "[u]nfortunately" not refunded to Mrs. Crocker after coverage was denied. Pet. 8.[8]

---

[8] Petitioner tries to shift the blame for the failure to refund the

The mental anguish suffered by a 50-year-old recent widow of modest means facing the imminent loss of her home is obvious.[9] As the trial court found, "[o]bviously, the jury, drawing on its common experiences in life, could comprehend the concern manifested by the plaintiff at the likelihood of losing her home due to the alleged fraud of the defendants." Pet. App. 17a. Indeed, under Alabama law substantial compensatory damages are warranted by less severe emotional trauma. *E.g.*, *Life Ins. Co. of Georgia*, No. 1940357, slip op. at 9 (upholding $250,000 mental anguish award to plaintiff who "learn[ed] that the insurance policy she had paid on for almost three years was worthless," and noting that she "could not sleep and her meal schedule was disrupted"); *Sperau v. Ford Motor Co.*, 1995 Ala. Lexis 263, *52-53 (Ala. June 9, 1995) (allowing mental anguish awards of $200,000 and $500,000 in fraud case and explaining that "the loss of a single weekly or monthly paycheck to a person of insubstantial means may cause as much mental anguish as a multi-million dollar loss would to

---

premium. Pet. 8. The fact is that Union Security made no attempt to ensure that any refund was made. After it denied the claim, it closed Mrs. Crocker's file. R. 344. Its claims manager testified that "I don't see anything referring to a refund of premium in here." *Id.* He stated that he didn't know anything about whether a refund was made, when it was made, what amount should have been refunded, or whether interest was paid. R. 345.

The only reason any refund was paid was the personal intervention of the President of First Alabama, Choctaw. R. 739-40. Even then, he acted only after the instant lawsuit was filed. Pet. App. 21a; R. 742-43. And he refunded only *half* the premium - the portion attributable to Mr. Crocker. R. 744.

[9] Mrs. Crocker testified that the events precipitated by the fraud caused her to be "upset," R. 587, but petitioner successfully objected to this testimony as "call[ing] for a mental operation and self-serving declaration on the part of the witness." R. 587. It is thus inconsistent for petitioner now to demand additional direct evidence of mental anguish, when it resisted such evidence at trial.

one of substantial means"), petition for cert. filed (Nov. 15, 1995); *Duck Head Apparel Co. v. Hoots*, 659 So.2d 897 (Ala. 1995) (mental anguish awards of $2 million, $1 million, and $500,000 for humiliation after supplier falsely accused former salesmen of misconduct); *Alabama Power Co. v. Harmon*, 483 So.2d 386, 390 (Ala. 1986) ($75,000 damages in mental anguish for breach of contract); *Birmingham Electric Co. v. Thompson*, 37 So.2d 633, 634 (Ala. 1948) ("there [is no] yardstick for . . . mental suffering").

II. IN ANY EVENT, THE AWARD IN THIS CASE WOULD NOT BE EXCESSIVE, EVEN IF ALL $2 MILLION WERE PUNITIVE

Petitioner's excessiveness claim simply ignores the careful analysis performed by the Alabama courts. The trial court issued a detailed, 14-page opinion remitting the damage award by $2 million and explaining the basis for its decision under the factors approved in *Haslip*. Pet. App. B. The court explained that its "copious notes of the trial of this case have been read and re-read; even portions of the transcribed testimony of some of the witnesses, and the oral charge have been reviewed. Every brief has been carefully considered, each having been read at least once. Numerous cases have been perused for, inter alia, comparative punitive damage awards, and the Court has conducted independent research." Pet. App. 24a. Moreover, the court took full advantage of its unique, first-hand vantage point: "Implicit in the trial court's review of any punitive damage award are the personal observations of the Court considering the presentation of the case by the respective attorneys; the demeanor, candor, and apparent truthfulness of the witnesses; the attentiveness by members of the jury; and the 'feel' for fairness vel non in the atmosphere wherein the trial is conducted." *Id.* at 24a-25a.

The Alabama Supreme Court reviewed the same factors and agreed with the trial court's decision. Pet. App. 10a-13a. The court explained that, "after an exhaustive review of the record, we agree that the punitive damages award, after remittitur, does not exceed the amount necessary to promote society's goals of punishment and deterrence, in order to exorcise fraud and inequity from the marketing of credit life policies." Pet. App. 11a-12a. The damage award in this case is plainly reasonable by reference to a host of factors approved by this Court in *Haslip* and *TXO*.

1. *The harm that was likely to occur from petitioner's misconduct, as well as the harm that actually occurred.* The trial court properly found that the damages to plaintiff were "grievous." Pet. App. 20a. She faced the prospect of substantial indebtedness and the loss of her home as a result of Union Security's failure to pay the balance of the loan.

The Alabama courts have expressed a special concern with the sort of insurance fraud at issue here. *See Life Ins. Co. of Georgia*, No. 1940357, slip op. at 13 ("The class of plaintiffs Life of Georgia preyed upon were from a group of citizens that need the most protection: elderly, uneducated, and low income."). Punitive damages "'help level the playing field between powerless plaintiffs and powerful defendants.'" *Id.* at 15 (citation omitted). "'Using punitive damages to redress the imbalance in the relationship between consumer and corporation is squarely within their historical tradition.'" *Id.* at 16 (internal quotation omitted).

Petitioner claims (Pet. 18 n.15) that the reprehensibility of its misconduct is mitigated by the fact that, some months *after* the threat of foreclosure was made, one of Mrs. Crocker's lawyers began to loan her money to enable her to make her mortgage payments so that she would not lose her house. R. 631. Petitioner's argument is frivolous. The damage award must be evaluated by the *potential* harm posed by petitioner's

misconduct. *See TXO*, 113 S. Ct. at 2722 (plurality opinion). Petitioner should hardly receive a windfall because one of respondent's attorneys volunteered to help her make mortgage payments — any more than a convicted swindler should receive leniency because a good samaritan happens to reimburse the victim for the financial loss. In any event, the attorney's assistance did not eliminate Mrs. Crocker's mental anguish or other harm, because the loan occurred long *after* the fraud and threatened foreclosure, R. 631-32, and because she still faces the obligation to repay the money to her attorney.

Petitioner also contends that the ratio between the harm and the damage award is excessive. Indeed, the petition is littered with arithmetic calculations about the precise ratio between the damage award in this case and the amount of the Crockers' loan, the amount remaining on the premium, and the profit derived from Union Security from the fraud. Pet. 17-18. Yet this Court has already held that there is no "ratio rule" prescribing a particular relationship between punitive damages and the harm suffered by a plaintiff.[10] More fundamentally, petitioner's calculations are flawed at their core because they assume that the entire $2 million damage award is punitive. In fact, there is reason to believe that the award includes a substantial component of compensatory damages. *See* Part I,

---

[10] *See, e.g., TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2722 (1993) (plurality opinion) (neither 526:1 ratio between punitive and compensatory damages, nor 10:1 ratio between punitive damages and potential harm, would be constitutionally excessive) (plurality opinion); *Haslip*, 499 U.S. at 23 (4:1 ratio between punitive and compensatory damages, and 200:1 ratio between punitive damages and plaintiff's out-of-pocket expenses); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262, 279 (1989) (ratio of punitive to compensatory damages over 100:1); *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919) (penalty 113 times plaintiff's actual loss permissible because it need not be "confined or proportioned to ... loss for damages").

supra. Petitioner's "ratio" argument, and its effort to describe the award in precise mathematical terms, falls flat.

2. *The nature of Union Security's misconduct*. Petitioner's statement wholly misrepresents the basis of the award in this case. The Alabama courts found that Union Security bears full responsibility for the fraud in this case. The trial court found that no one from Union Security adequately supervised Taylor, "nor had anyone from the insurance company ever explained to him the provisions of such a policy or the procedures relative to same." Pet. App. 18a; *see also* R. 308.

Moreover, the Alabama Supreme Court found that "Union Security does not issue a written policy to those applicants who are accepted for coverage." Pet. App. 3a. Indeed, the trial court noted that "it was undisputed" that the Crockers never received "either a certificate of life insurance or a copy of the policy of credit life insurance which they had purchased." *Id.* at 17a-18a. Thus, "[o]ne can read and re-read the Statement of Debtor's Physical Condition executed by Coleman Crocker at the time he purchased credit life insurance from the defendants, and nowhere is there any indication that there is any correlation between credit life insurance coverage and the answers as set forth in the Statement." *Id.* at 18a.

These practices violated Regulation No. 28 of the Insurance Commissioner of the State of Alabama, which provides that "[a]ll Credit Life Insurance sold shall be evidenced by a policy, certificate or statement of insurance, which shall be delivered to the insured borrower or purchaser. . . . . Said policy, certificate or statement of insurance shall set forth the amount and term of the coverage, a brief description of the coverage, including any exceptions, limitations, or restrictions." Ct. R. 253-54. Indeed, Union Security's claims manager testified at trial that he had "been made aware, possibly," of the company's violation of Alabama law. R. 433.

Petitioner ignores these important bases of the damage award,

and asserts (incorrectly) that the "*only* conduct of Union Security" that is at issue here is "its practice of investigating those claims made during the one-year contestability period that appear to be related to a condition listed on the Health Statement" — a practice that petitioner claims is entirely "lawful." Pet. 15-16 (emphasis in original). Even as to this aspect of its behavior, Union Security is wrong in suggesting that its conduct was not culpable. In fact, petitioner's policies facilitated the fraud. Prior to an application for credit life being approved, Union Security employs no safeguards whatsoever to ensure that its agents accurately fill out the health questions on its medical statement. R. 444. As the Alabama Supreme Court found, "Union Security does not examine the health records of those applicants who indicate on the health disclosure statement that they have no history of a particular illness or health condition. Union Security does, however, reserve the right to examine applicants' health records to determine 'after the fact' whether coverage should have been issued." Pet. App. 3a. The evidence showed that the great majority of claim denials result from post-claim investigation of the health statements. R. 334, 335.

Although the failure to investigate health conditions before issuing insurance is not criminal or directly prohibited by statute, it creates an atmosphere in which agents have every incentive to defraud consumers into signing up for credit life policies for which they would be disqualified for health reasons if they asserted a claim. After all, consumers who never make a claim on their credit life policies will never discover that they have been defrauded into making payments for worthless insurance that would not have provided them any protection. The Alabama Supreme Court explained:

> As the law in Alabama currently stands, an insurance company may issue a life insurance policy with its knowledge of its applicant's health coming solely from its

> agent's questioning of the applicant about his or her health history. *The benefits from this type of transaction lie solely in favor of the insurance company and its agent.* The insurance company receives premiums month after month, while the agent retains a commission from the sale. But when the insured dies, the insurance company refuses to pay the benefits provided by the policy. Its refusal is based upon its discovery, for the first time, that the insured's health was poor. When the policy is sold, an agent is not required to delve thoroughly into the applicant's background for the details of his health history. Such a requirement *could prevent situations like the one in this case.*

Pet. App. 12a (emphasis added and internal quotation omitted).

In its petition for certiorari, Union Security argues that it derives no benefit from its failure to ensure that the answers to the Health Questions are answered accurately. Pet. 14 n.11, 15 n.12. The hard evidence, however, is to the contrary. The record shows that, by employing lax screening procedures and maximizing sales of credit life insurance, Union Security earns immense profits. "[T]he loss ratios of Union Security with First Alabama through these four years [1988, 1989, 1990, and 1991] were, respectively, 20.6%, 21.1%, 16.3%, and 17.0%." Pet. App. 8a-9a. Expert testimony established that a 50% loss ratio was typical for other companies and represented "a more reasonable balance between the insurer and the insureds." *Id.* at 9a. Union Security's speculation notwithstanding, the facts showed that Union Security's "see-no-evil" policy redounds enormously to its own profit.[11]

---

[11] At trial, Union Security's claims manager asserted that he was unaware that a 50% loss ratio is customary. He claimed to be unaware of anyone in the company who might be familiar with the topic. R. 372. Such evasiveness under oath further illustrated the need to punish Union Security.

Finally, it is significant that Union Security took virtually no corrective action in response to the fraud in this case. In fact, Union Security's claims manager testifed that Mrs. Crocker's claim was handled in "the normal way," R. 425; that he didn't see "anything wrong" with the way Union Security behaved, R. 425-26; and that no one was reprimanded, suspended, or received a citation as a result of the fraud. R. 427. Such lack of contrition is also an important basis of punitive damages. *See, e.g., Haslip*, 499 U.S. at 13-15 (punitive damages needed under respondeat superior to create incentive to discipline agents); *Life Ins. Co. of Georgia*, No. 1940357, slip op. at 12 ("The harm which was committed is even more egregious because [the defendant] refuses to admit or concede any wrongdoing whatsoever and merely [attributes] the sale of this policy [to] a 'miscommunication.'").

3. *The profitability of the wrongful conduct.* The trial court found that "[b]oth of these defendants were in this business to make money, and the sale of credit life insurance was profitable to both." Pet. App. 18a. The evidence showed that Union Security's net gain from credit life insurance was $1.29 million in 1991. *Id.* at 21a.

4. *The financial position of the defendant.* The trial court found that, at end of 1993, petitioner had a net worth of $24.34 million, and an unassigned surplus of $14.99 million. Pet. App. 21a. The punitive award plainly did not impair petitioner's financial position. Indeed, petitioner's wealth precludes any substantive due process attack on the award, for this Court has repeatedly noted the "well-settled law" that the size of a punitive damage award may be justified as constitutionally reasonable by reference to a defendant's wealth. *TXO*, 113 S. Ct. at 2722 n.28 (plurality opinion).[12]

---

[12] *See also Haslip*, 499 U.S. at 21-22; *Browning-Ferris*, 492 U.S. at 300 (O'Connor, J., concurring in part and dissenting in part); *Newport v. Fact*

5. The costs of litigation. Under Alabama law, punitive damages perform an important function in encouraging private citizens to bring suit to vindicate the public interest. "Alabama citizens who become the victims of fraud have little recourse other than through litigation. . . . [T]he State Insurance Department has little power to regulate agents, and we judicially know that litigation is often the only weapon defrauded citizens have." *Life Ins. Co. of Georgia*, No. 1940357, slip op. at 14-15. "Attorneys who represent victims of fraud, such as the fraud practiced upon this plaintiff, bear all of the expense of the litigation and carry all of the risk of failure. . . . The lawyer takes a significant risk in such cases." *Id.* at 16. "Statistics indicate that most cases produce no money damages at all for plaintiffs or their lawyers. . . . Litigation is slow and carries no guarantee of success. . . . It is a heavy burden, and litigation is an inefficient way to stop fraudulent conduct — one lawsuit at a time, brought by one victim at a time — but it provides the only recourse a defrauded citizen of Alabama has." *Id.* at 17-18.[13]

This Court has similarly recognized the "private attorney

Concerts, Inc., 453 U.S. 247, 270 (1981); *Washington Gas Co. v. Lansden*, 172 U.S. 534, 551 (1899); Restatement (Second) of Torts § 908(2) & comment e (1977); *Punitive Damages: Relationship to Defendant's Wealth*, 87 A.L.R.4th 141, 151 (1992) (the "vast majority of courts" permit wealth to be considered).

[13] Even if the tort here was "an isolated incident" on the part of Union Security, Pet. App. 20a, 23a, Alabama was entitled to impose substantial punitive damages in order "to eradicate intentional conduct by the particular defendant before the court and to deter others from similar conduct." *Life Ins. Co. of Georgia*, No. 1940357, slip op. at 14. This Court has confirmed the function of punitive damages in providing "general deterrence" — *i.e.*, in preventing misconduct by other potential tortfeasors. *E.g.*, *Haslip*, 499 U.S. at 19-22; *Day v. Woodworth*, 62 U.S. (21 How.) 202, 213-14 (1858).

general" rationale for punitive awards. *E.g.*, *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512, 523 (1885) ("The injury received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages."). Thus, petitioner's attempt to minimize the economic loss suffered by respondent only goes to demonstrate the need for a substantial punitive award in this case.[14]

The trial court found that the award in this case was necessary to serve this private attorney general function and to provide respondent and her attorneys "significant recovery to litigate this type of case." Pet. App. 22a. The costs of litigation were substantial: as of the post-trial hearing, respondent's attorneys had "already expended approximately $35,000." *Id.* This sum, of course, does not take into account the additional expenses occasioned by the subsequent lengthy proceedings in this case. In addition, the trial court observed that respondent had previously engaged another attorney to represent her, who perhaps "did not have the necessary financial resources or time to pursue this claim." *Id.*

Hence, the award here is demonstrably reasonable under each of the familiar factors employed in reviewing punitive awards.

III. THIS CASE IS UNRELATED TO *BMW v. GORE*

In its Application for Stay, petitioner stated that it would present three questions for this Court's review, including an

---

[14] *See also* Note, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose* 9 Pac. L.J. 823, 841-42 (1978) ("Nowhere is the potential for a result contrary to the purpose of punitive damages greater than in the area of consumer actions. This is an area in which the claim of an individual is most likely to be so small in comparison to the cost of litigation as not to warrant court action.").

extraterritoriality question of the sort involved in *BMW v. Gore*. On the basis of that representation, this Court granted a stay of the judgment of the Alabama Supreme Court. 116 S. Ct. 295 (1995). Petitioner has now abandoned all but its excessiveness claim. *See* notes 1 and 2, *supra*. To be sure, petitioner had little choice in the matter, for it plainly failed to preserve the extraterritoriality issue below,[15] and the "extraterritoriality" issue is a red herring in this case.[16] But it is evident that this case is nothing like *BMW v. Gore*. This case involves what was indisputably "a properly functioning jury," Pet. App. 11a, not one that committed constitutional error (according to BMW, at least) by relying on out-of-state transactions.

Nor is the excessiveness issue in *BMW* related to the question presented by Union Security. The petitioner in *BMW* argues that its nondisclosure, even if wrongful, was "objectively" of only limited reprehensibility at best, because the conduct "comported with the statutory disclosure thresholds of numerous states" and was "consistent with industry practice." Brief of Petitioner in *BMW* at 39, 40; *see id.* at 36-42. In addition, BMW maintains that the award was "completely out

---

[15] Petitioner made no objection on the basis of "extraterritoriality" to the introduction of any evidence at trial, to any portion of plaintiff's closing argument, or to any aspect of the jury instructions. Pet. App. 15a. Petitioner made no mention of the "extraterritoriality" issue in seeking a remittitur in the circuit court. Petitioner failed to raise the issue before the Alabama Supreme Court, even on rehearing.

[16] The jury was not asked to punish petitioner for extraterritorial acts. In fact, the trial court found that "no evidence" was before the jury of "similar misrepresentations or concealments/suppressions" by the defendants, Pet. App. 20a — and thus there were no extraterritorial acts on which the punitive award might have been based. Indeed, petitioner contends in another part of its argument that the award was based solely on "an isolated incident." Pet. 19.

of line with" the legislatively prescribed penalties for such misconduct set by Alabama itself, as well as by other States. *Id.* at 43; *see id.* at 42-44.

At oral argument in *BMW*, counsel for BMW stated that "in this case I think it's extremely important that the penalties provided under the Deceptive Trade Practices Act for fraud in selling automobiles is $2,000 if it's a civil penalty, or treble damages plus attorney's fees in a private action." Tr. Oral Arg. in No. 94-896, at 27-28. BMW also raised constitutional concerns about the imposition of multiple punitive damage awards on the basis of a single act by a defendant. *Id.* at 25, 27, 28.

This case is radically different, for it is wholly missing the objective indicators that BMW relies on to suggest excessiveness of the punitive award in its case. Nor is there any issue of "multiple" punitive damage awards here, for by petitioner's own admission this case involves a single "isolated incident." Pet. 19. And the simple fact is that petitioner has never pointed in this case to any state statutes, in Alabama or elsewhere, that create a safe harbor for the fraud at issue; and it has likewise never pointed to any industry practice that accepts or tolerates fraud of the sort at issue. Indeed, the Alabama Supreme Court has noted that insurance fraud is typically regulated by the state tort system, not by the State Insurance Department. *Life Ins. Co. of Georgia*, No. 1940357, slip op. at 14-15.

In short, the essential bases for BMW's claim of excessiveness, which are crucial to its effort to frame an objective standard and an outer limit for judging excessiveness, are lacking in this case. Thus, even if this Court agrees with BMW's argument, the ruling in that case would not affect the result here. This Court has not granted certiorari in every punitive damages case involving an excessiveness question. Indeed, even since the grant of certiorari in *BMW*, this Court

has frequently denied review in punitive damages cases, rather than holding the petitions pending disposition of *BMW*.[17]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

LARRY W. MORRIS
CLAY HORNSBY
MORRIS, HAYNES, INGRAM
& HORNSBY
P.O. Box 1660
Alexander City, AL 35010
(205) 329-2000

JONATHAN S. MASSEY
Counsel of Record
3920 Northampton St., N.W.
Washington, D.C. 20015
(202) 686-0457

Counsel for Respondent

December 11, 1995

---

[17] *See Gust v. Levy*, 116 S. Ct. 171 (1995) (cert. denied); *Smithtown, N.Y. v. Walz*, 115 S. Ct. 2557 (1995) (cert. denied); *Boyajian v. Olfacto-Labs*, 115 S. Ct. 2247 (1995) (cert. denied); *O'Quinn v. Kline*, 115 S. Ct. 2579 (1995) (cert. denied); *AJ & AJ Servicing Inc. v. Tudor Associates Ltd.*, 115 S. Ct. 1957 (1995) (cert. denied); *Ezzone v. Hansen*, 115 S. Ct. 1958 (1995) (cert. denied); *Ferrellgas Inc. v. Clay*, 115 S. Ct. 1102 (1995) (cert. denied).